No. 76-1439

In the Supreme Court of the United States

OCTOBER TERM, 1976

LOUIS M. PIHAKIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioner contends that the courts below erred in finding that the prosecution had made no implied promise to drop further prosecutions for petitioner's participation in a nationwide mail fraud scheme if petitioner pleaded guilty to mail fraud charges in Alabama.

1. In January 1971, petitioner was indicted in the United States District Court for the Northern District of Alabama for mail fraud and conspiracy arising out of his participation in a nationwide advance-fee mortgage operation. The government agreed to continue the indictment until petitioner had exhausted his appeals from Alabama state convictions on similar charges. The state convictions were eventually reversed, exposing petitioner to further state prosecution (Pet. App. 3).

In May 1972, petitioner and others were indicted in the United States District Court for the Northern District of Illinois on mail fraud and conspiracy charges arising out of the same advance-fee mortage operation.[1] On February 8, 1973, the federal prosecutor in Illinois was directed by the Chief of the Frauds Section of the Justice Department's Criminal Division to dismiss the indictment because the Department was planning to obtain an indictment on the same charges elsewhere. The federal prosecutor in Alabama informed petitioner's Alabama counsel that the Illinois charges would be dismissed, but he did not advise him of the Department's plans for further prosecution. The Illinois indictment was dismissed on March 2, 1973 (Pet. App. 3, 8-9).

On March 5, 1973, petitioner pleaded guilty to the Alabama indictment. Prior to that plea, petitioner reached an agreement with federal and state prosecutors in Alabama that petitioner would plead guilty to both the state and federal charges and would receive concurrent sentences, with unsupervised probation on the state charges. Petitioner thereby avoided incarceration in an Alabama penal institution (Pet. App. 3, 8-9). He was sentenced to a term of two years' imprisonment upon his plea of guilty to the federal charges in Alabama, and he has served that sentence (Pet. App. 8).

In April 1975, a federal indictment was returned in the United States District Court for the Middle District of Florida charging petitioner with various counts of mail fraud and conspiracy, in violation of 18 U.S.C. 371 and

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[1]Although the charges in the Illinois and Alabama indictments were similar, they charged different offenses. The Alabama indictment focused on activities in the Birmingham area, the companies involved were located in Birmingham, and the 25 overt acts charged in the Alabama indictment related to operations in Alabama (Pet. App. 11).

1341. Petitioner moved before trial to dismiss the indictment on the ground that the government impliedly had agreed as part of the Alabama plea bargain not to bring additional charges arising out of the mortgage-payment scheme. The district judge held a two-day hearing on the motion, taking testimony from petitioner's relatives, his Birmingham defense attorneys, and government attorneys from Alabama and Illinois. After considering this testimony and the transcript of petitioner's guilty plea hearing, the district court found that the plea was not conditioned upon dismissal of the Illinois indictment, and that the government had not impliedly promised it would never prosecute petitioner for mail fraud offenses against other persons in other districts (Pet. App. 3-4, 12-14).

Thereafter, petitioner was convicted in a bench trial on stipulated facts in the United States District Court for the Middle District of Florida on three counts. He was sentenced to concurrent terms of two years' imprisonment on each count. The court of appeals affirmed (Pet. App. 1-6; 545 F. 2d 973).

2. Petitioner contends (Pet. 7-11) that the failure of the prosecutor to inform him that the Illinois indictment was dismissed with the intent of later bringing the same charges in another jurisdiction constituted a material misrepresentation that affected his decision to plead guilty to the Alabama indictment. He suggests that, by failing to give him this information, the prosecutor misled him into thinking that his plea bargain in Alabama was a "package deal" covering all possible charges arising out of the mortgage fraud operation.

The gravamen of petitioner's claim is that the district court's findings rejecting his version of the plea bargain are clearly erroneous. There is no reason for this Court to resolve this essentially factual contention, since petitioner

fails to demonstrate the " 'very obvious and exceptional' error" necessary for this Court to reject the concurrent findings of the two courts below. *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635.

As the court of appeals observed (Pet. App. 5):

> Persuasive evidence of appellant's understanding of the Chicago dismissal comes from the transcript of his Birmingham guilty plea proceeding. Judge Pointer specifically inquired about appellant's understanding of the discussions concerning state charges and the Chicago indictment. The judge instructed appellant that if his guilty plea were contingent or conditional in any way upon what happened to the state and Chicago charges he (Judge Pointer) could not accept the plea. Appellant answered emphatically that the discussions concerning the state charges and the Chicago indictment were not conditions of his plea. Judge Pointer even suggested to appellant that he "might find [himself] faced with a trial on matters that are pending in Chicago even though you plead it at this time." Appellant answered: "That is correct, I understand it." There is no basis for any reliance by appellant after Judge Pointer cautioned him that his guilty plea could not be conditioned on the outcome of the Chicago charges.

Petitioner's argument (Pet. 12-14) that the decision below conflicts with *Correale* v. *United States*, 479 F. 2d 944 (C.A. 1), and *United States* v. *Hammerman*, 528 F. 2d 326 (C.A. 4), is premised on his assumption that the district court's findings are clearly erroneous. Unlike those cases, however, the court of appeals here found ample support in the record for the district court's determination that no promise of the kind asserted had been made. In *Correale* and *Hammerman* the plea bargains had been induced by promises the prosecution could not keep. Here,

the court of appeals was "quite aware that when a plea rests to a significant degree on a promise or agreement of the government which induces the plea, such promise must be fulfilled" (Pet. App. 5). But on the record before it, it could not conclude that the district court erred in finding that the government made no express or implied promise relating to the Illinois charges and that petitioner's Alabama guilty plea was in no way conditioned on disposition of the Illinois charges (Pet. App. 5-6). Accordingly, the approach adopted here is fully consistent with *Correale* and *Hammerman*.

This case is also unlike *Blackledge* v. *Allison*, No. 75-1693, decided May 2, 1977, and *Vandenades* v. *United States*, 523 F. 2d 1220 (C.A. 5). In *Blackledge*, this Court held that, in light of North Carolina's ineffective method of determining the voluntariness of a guilty plea at the time it was taken, a hearing was required to resolve the defendant's later allegation that the terms of his plea bargain had been violated. Similarly, in *Vandenades*, it was held that a hearing was necessary before a motion for relief under 28 U.S.C. 2255 raising issues of fact incapable of resolution from the files and records of the case could be determined. The district court's decision in this case followed a two-day hearing at which petitioner had a full opportunity to adduce all evidence relating to his claim.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

JUNE 1977.